Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MASAMI AIZAWA,

Petitioner,

v.

THE SOVEREIGN STATE OF JAPAN; THE JAPANESE MINISTRY OF JUSTICE; THE JAPANESE MINISTRY OF FOREIGN AFFAIRS; THE SUPREME PROSECUTOR'S OFFICE OF JAPAN; THE ISHINOMAKI DISTRICT PUBLIC PROSECUTOR'S OFFICE; THE SENDAI HIGH PUBLIC PROSECUTOR'S OFFICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD O.C. ORD
ORD & NORMAN
120 Montgomery Street
Suite 1055
San Francisco, CA 94104
(415) 274-3800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

46 pp

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit properly denied Petitioner, a non-English speaking Japanese pro per litigant, the opportunity to file a notice of appeal and have the merits of his appeal passed upon, when it failed to direct the United States District Court for the Central District of California to either (1) enter a final judgment specifically dismissing Petitioner's action as to each and every Defendant named in the complaint (Respondents herein), including Respondent the Japanese Ministry of Justice, a juridical entity separate and distinct from Respondent the Sovereign State of Japan and its other distinct agencies and/or instrumentalities named in the complaint, or (2) comply with the mandatory judgment certification requirements of Fed. R. Civ. P. 54(b) given that its purported order of dismissal did not dismiss Petitioner's action as to Respondent the Japanese Ministry of Justice.

Whether the United States Court of Appeals for the Ninth Circuit properly failed to recognize that the inclusion or omission of a particular foreign agency or instrumentality from a judgment or order is a matter of tremendous legal significance.

Whether the United States Court of Appeals for the Ninth Circuit has, to an extent calling for the exercise of this Court's supervisory power, (1) sanctioned the departure of the United States District Court for the Central District of California from the usual course of judicial proceedings when the District Court failed to both (a) respect the status of Respondent the Japanese Ministry of Justice as a juridical entity separate and distinct from

QUESTIONS PRESENTED – Continued

Respondent the Sovereign State of Japan and (b) adhere to the mandatory judgment certification requirements of Fed. R. Civ. P. 54(b), and (2) when the Ninth Circuit has itself departed from the usual course of judicial proceedings by (a) summarily affirming the District Court without considering Petitioner's opening brief, which had already been filed, in contravention of its own case law, and (b) construing Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* as a motion for reconsideration in an apparent attempt to avoid the *en banc* review procedures of Fed. R. App. P. 35, which would have required circulation of Petitioner's suggestion for *en banc* review among the Ninth Circuit's judges in regular active service.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Masami Aizawa, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed in the above entitled proceeding on April 24, 1997, and the related order filed in the above entitled proceeding on June 4, 1997, construing Petitioner's petition for rehearing as a motion for reconsideration, denying reconsideration, and rejecting Petitioner's suggestion for *en banc* review.

OPINIONS BELOW

The opinion and judgment of the Ninth Circuit Court of Appeals dated April 24, 1997, was not reported. A copy of the opinion and judgment is reproduced in the Appendix at p. 1. The order denying Petitioner's Motion for Entry of a Final Judgment entered by the United States District Court for Central District of California on November 22, 1996, from which Petitioner's appeal to the Ninth Circuit was taken, was not reported and is reproduced in the Appendix at pp. 2-3. The original Order Dismissing Action as to Certain Defendants, entered by the United States District Court for the Central District of California on June 26, 1996, was not reported and is reproduced in the Appendix at p. 4. The order of the Ninth Circuit Court of Appeals dated October 23, 1996, dismissing Petitioner's attempted but premature appeal from the District Court's June 26, 1997, order, was not reported and is reproduced in the Appendix at p. 5. The order of the Ninth Circuit Court of Appeals dated June 4,

1997, construing Petitioner's petition for rehearing as a motion for reconsideration, denying reconsideration, and rejecting Petitioner's suggestion for *en banc* review, was not reported. A copy of that order is reproduced in the Appendix at p. 6.

JURISDICTIONAL STATEMENT

On April 24, 1997, the Ninth Circuit Court of Appeals entered judgment and opinion summarily affirming the District Court's November 22, 1996, order denying Petitioner's Motion for Entry of a Final Judgment as moot. On June 4, 1997, the Ninth Circuit Court of Appeals entered a subsequent order construing Petitioner's petition for rehearing as a motion for reconsideration, denying reconsideration, and rejecting Petitioner's suggestion for *en banc* review.

The jurisdiction of this Court to review the judgment of the Ninth Circuit Court of Appeals and subsequent order is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fed R. Civ. P. 54(b)

Ninth Circuit Rule 27-10

Fed. R. App. P. 35

28 U.S.C. § 1610

STATEMENT OF THE CASE

Petitioner Masami Aizawa filed his First Amended Unverified Complaint on January 6, 1995, in the United States District Court for the Central District of California, alleging jurisdiction under the Foreign Sovereign Immunities Act (28 U.S.C. §§ 1602-1611). The causes of action stated in the complaint arose from adverse activities of Respondents the Sovereign State of Japan and five of its separate and distinct ministries, agencies and/or instrumentalities.

Respondents, the Sovereign State of Japan et al., were twice served with summons and complaint. The first service on Respondents was attempted on or about January 18, 1995. Respondents refused service by returning the documents on or about March 31, 1995. The second service was sent by the District Court on or about August 10, 1995.

On November 20, 1995, Petitioner attempted to file with the District Court a Request to Enter Default of the Respondents for their failure to timely respond to either of the services made on them. The Clerk of the District Court returned the request and did not file it because the request did not specifically name all of the Respondents. On November 28, 1995, Respondents filed their Ex Parte Application for an Order Enlarging Time to Respond to Amended Complaint to December 11, 1995. U.S. Magistrate Judge Brian Quinn Roberts granted the application on November 30, 1995. On December 1, 1995, Petitioner once again attempted to file his Request to Enter Default of the Respondents. This time, the request specifically mentioned all six (6) of the named Respondents. The

Clerk of the District Court, however, again refused to file the request, this time on the ground that the Respondents had already been granted an extension of time to respond to the complaint. On December 11, 1995, Respondents filed a Motion to Dismiss Petitioner's action for lack of jurisdiction under the Foreign Sovereign Immunities Act, along with a supporting Memorandum of Points and Authorities. Petitioner filed an opposition to this motion on February 12, 1996, and Respondents filed a response to the opposition on or about February 16, 1996.

Respondents' Motion to Dismiss was heard before the District Court on June 24, 1996. Counsel for both Petitioner and Respondents appeared telephonically. The District Court ostensibly purported to grant Respondents' Motion to Dismiss the action as to "all named defendants." This is what the minute order from the June 24, 1996, hearing indicated.

The actual order of dismissal, however, differed substantially from the minute order in that it only dismissed the action as to "certain defendants." Appendix p. 4. The list of "certain defendants" did not include the Japanese Ministry of Justice – a juridical entity separate and distinct from the other Respondents named in the complaint. The actual order of dismissal was entered on June 26, 1996, and did not contain the required certification under Fed. R. Civ. P. 54(b). Fed. R. Civ. P. 54(b) has been reproduced and is included in the Appendix at pp. 7-9.

Undersigned counsel's legal representation of Petitioner ceased immediately after the June 24, 1997, hearing. See the Declaration of Masami Aizawa filed in the District Court in support of Appellant's Motion for Entry

of a Final Judgment, Appendix pp. 17-18. Petitioner represented himself in handling the appeal, and filed the notice of appeal from the June 26, 1996, order himself on August 20, 1996. Appendix p. 17.

The Ninth Circuit dismissed Petitioner's appeal of the June 26, 1996, order in an order dated October 23, 1996, on the ground that the notice of appeal was filed after the 30-day period in Fed. R. App. P. 4(a)(1) had expired. Appendix p. 5. In actuality, however, Petitioner's first appeal was a nullity because the District Court had not yet entered a final judgment in compliance with the mandatory certification requirements of Fed. R. Civ. P. 54(b). If anything, then, Petitioner's notice of appeal was premature rather than too late.

Petitioner is a non-English speaking Japanese citizen who does not understand the U.S. legal system and is easily confused by U.S. court procedures. Appendix p. 18. Petitioner was confused by the District Court's June 26, 1996, order which only dismissed his action as to "certain defendants" and not as to the Japanese Ministry of Justice. Appendix p. 17.

On or about November 7, 1996, Petitioner filed his Motion for Entry of a Final Judgment in the District Court wherein he requested the court to enter a final judgment either pursuant to Fed. R. Civ. P. 54(b) or dismissing all claims as to all parties so that he could pursue his appeal in the Ninth Circuit. The District Court denied the motion as "moot" in an order dated November 22, 1996, on the apparent grounds that (1) it had intended to dismiss the action as to all Respondents in its June 26, 1996, order of dismissal, even though not all of the Respondents had

actually been dismissed, and (2) its dismissal of the action as to Respondent the Sovereign State of Japan had the effect of dismissing the action as to Respondent the Japanese Ministry of Justice (the party omitted from the June 26, 1996, order of dismissal), on the theory that the Japanese Ministry of Justice was "merely a part" of the Sovereign State of Japan rather than a distinct juridical entity. Appendix pp. 2-3.

On December 17, 1996, Petitioner filed a timely Notice of Appeal of the District Court's November 22, 1996, order denying his Motion for Entry of a Final Judgment. On February 26, 1997, the Ninth Circuit filed an order to show cause why the appeal should not be disposed of summarily. Petitioner filed a response to the Court's order on March 12, 1997, and a supplemental response on March 13, 1997. Respondents submitted their filing pursuant to this Court's February 26, 1997, order on or about March 24, 1997, and Petitioner filed a reply thereto on March 31, 1997.

On April 18, 1997, Petitioner filed his opening brief in the above entitled case, but on April 24, 1997, the Ninth Circuit entered an order summarily affirming the District Court, apparently without considering Petitioner's opening brief or his March 31, 1997, reply to Respondents' March 24, 1997, filing. Appendix p. 1.

On May 8, 1997, Petitioner filed his Petition for Rehearing and Suggestion for Rehearing *En Banc*, wherein he generally asserted that the Ninth Circuit, in entering its judgment, had committed two grave errors with respect to issues of exceptional importance in failing

to uphold the mandatory judgment certification requirements of Fed. R. Civ. P. 54(b) and in failing to acknowledge and respect the status of Respondent the Japanese Ministry of Justice as a separate juridical entity. Petitioner also pointed out to the Ninth Circuit that it had failed to follow its own decisions requiring it to consider Petitioner's opening brief in deciding whether to summarily affirm the District Court. The pages from Petitioner's Petition for Rehearing containing this latter argument have been reproduced and are included in the Appendix at pp. 19-20.

On June 4, 1997, the Ninth Circuit filed an order construing Petitioner's Petition for Rehearing as a motion for reconsideration under Circuit Rule 27-10 (which has been reproduced and included in the Appendix at pp. 10-11), denying reconsideration, and rejecting Petitioner's suggestion for *en banc* review. Appendix p. 6. This was apparently done in an attempt to avoid review of the Petition and a vote upon the appropriateness of *en banc* review by the Ninth Circuit's regular active judges under the procedures set forth in Fed. R. App. P. 35 (which has been reproduced and included in the Appendix at pp. 11-12). While these procedures require a majority of regular, active circuit judges to order *en banc* review, this entire process appears to have been effectively bypassed due to the Ninth Circuit's construction of Petitioner's Petition for Rehearing as a motion for reconsideration; under Fed. R. App. P. 35, the *en banc* review process only applies to hearings and rehearings, but not to motions for reconsideration. See Appendix p. 11. Thus, in all likelihood, the 40 extra copies of the Petition for Rehearing and Suggestion for Rehearing *En Banc* filed by Petitioner

were never circulated to the Ninth Circuit's regular, active judges, who were thus never even made aware of the grave errors committed by the Court in affirming the District Court's November 22, 1996, order.

As discussed in the Reasons for Granting the Writ below, the effect of the foregoing errors committed by the District Court and the Ninth Circuit has been to unjustly deprive Petitioner of his valuable appellate rights. We urge upon this Court that as a non-English speaking pro per litigant, Petitioner is especially deserving of the opportunity to have the merits of his case passed upon by the Ninth Circuit. Appendix pp. 17-18.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's decision is in conflict with the intent of Congress and decisions from this Court and other circuits holding that an agency or instrumentatity of a foreign sovereign is a juridical entity separate and distinct from any other such agency or instrumentality or the sovereign itself, and recognizing that the inclusion or omission of a particular foreign agency or instrumentality from a judgment or order is a matter of tremendous legal signifcance.

Petitioner's First Amended Unverified Complaint filed in the District Court on January 6, 1995, was brought against Respondent the Sovereign State of Japan and the following five (5) distinct agencies and/or instrumentalities of Japan: The Japanese Ministry of Justice, the Japanese Ministry of Foreign Affairs, the Supreme Prosecutor's Office of Japan, the Ishinomaki District Public

Prosecutor's Office, and the Sendai High Public Prosecutor's Office. The District Court's June 26, 1996, Order Dismissing Petitioner's Action as to Certain Defendants, in contrast, only dismissed Petitioner's action as to five (5) of the above six (6) Respondents. Petitioner's action conspicuously remained undismissed as to Respondent the Japanese Ministry of Justice. Appendix p. 4.

The District Court later addressed its failure to dismiss Petitioner's action as to Respondent the Japanese Ministry of Justice in its November 22, 1996, order wherein it asserted that Respondent the Japanese Ministry of Justice "was dismissed along with all of the other agencies of the Japanese government" in its June 26, 1996, order because the Japanese Ministry of Justice was "merely a part of" Appellee the Sovereign State of Japan. Appendix pp. 2-3. In so holding, the District Court, as well as the Ninth Circuit via the summary affirmance, contravened established precedent from this Court and other circuits holding that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983) (*"Bancec"*); *Hester International Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989); *McKesson Corporation v. Islamic Republic of Iran*, 52 F.3d 346, 351 (D.C. Cir 1995); *Hercaire International, Inc. v. Argentina*, 821 F.2d 559, 564 (11th Cir. 1987).

This Court in *Bancec* drew upon both international law and federal common law in arriving at the above holding, noting that:

> Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee. As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated. Due respect for the actions taken by foreign sovereigns and for principles of comity between nations . . . leads us to conclude . . . that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.

462 U.S. at 626, 627.

This Court also found support holding for its holding in the Foreign Sovereign Immunities Act itself, noting that Congress, in enacting 28 U.S.C. § 1610(b) (the provision of the Act dealing with the circumstances under which a judgment creditor may execute upon the assets of an instrumentality of a foreign government – see Appendix pp. 13-16), "clearly expressed its intention that duly created instruments of a foreign state are to be accorded a presumption of independent status." *Id.* at 627. This point is amply illustrated by the following quote from the provision's legislative history:

> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling

> reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. . . . H.R.Rep. No. 94-1487, pp. 29-30 (1976), U.S.Code Cong. & Admin.News 1976, pp. 6628-6629 (citation omitted).

Id. at 627, 628.

Thus, had Petitioner obtained a judgment against Respondent the Japanese Ministry of Foreign Affairs and the other four (4) Respondents who were actually listed in the District Court's June 26, 1996, Order Dismissing Action as to Certain Named Defendants, this judgment would not have listed and therefore would not have been enforceable against Respondent the Japanese Ministry of Justice. Contrary to the decisions of the District Court and the Ninth Circuit below, then, the inclusion or omission of a particular foreign agency or instrumentality from a judgment or order is a matter of tremendous legal significance, and cannot be cured with the summary assertion that the instrumentality is indistinct from the sovereign itself. It is not. The District Court therefore ran afoul of this Court's *Bancec* decision, the above-cited circuit court decisions, and the unequivocal intent of Congress when it stated in its November 22, 1996, order that "the Ministry of Justice is merely a part of 'The Sovereign State of Japan' and was dismissed along with all of the other agencies of the Japanese government" in its June 26, 1996, order. Appendix pp. 2-3. It was not. By summarily affirming the District Court in its April 24, 1997, order, the Ninth Circuit placed its stamp of approval on this

grave error of tremendous legal significance, namely, it failed to acknowledge the legal status of the Japanese Ministry of Justice as a separate juridical entity.

As the United States District Court for the District of Columbia put it in *Gibbons v. Republic of Ireland*, 532 F.Supp. 668, 671 (D.C.D.C. 1982):

> It is evident from the Act that Congress contemplated that an action could be brought against either a foreign state or one of its instrumentalities depending on the circumstances but that a foreign state should not be automatically subject to suit for the actions of one of its instrumentalities. If this were not the case little purpose would be served by specifically providing for suits against an instrumentality and the distinctions drawn in the Act between the sovereign and and its instrumentalities would be largely superfluous.

Thus, the Ninth Circuit's decision below is in direct conflict with an Act of Congress.

In addition, it is significant to point out that Petitioner specifically and intentionally drafted his complaint to include the Japanese Ministry of Justice as a separate and distinct party to the action. In construing Petitioner's complaint for purposes of Respondents' dismissal motion, the District Court was required to treat this specific designation by Petitioner as true and correct.

2. The Ninth Circuit's decision is in conflict with decisions from this Court and other circuits holding that the judgment certification requirements contained in Fed. R. Civ. P. 54(b) are mandatory in nature and must be strictly followed, particularly in a situation where failure to abide by the requirements would result in the loss of valuable appellate rights.

It is hornbook law under the Federal Rules of Civil Procedure that a district court order which disposes of fewer than all of the claims in an action, or the rights and liabilities of fewer than all of the parties to the action, is not a final judgment absent express Rule 54(b) certification by the district court. *Sears, Roebuck and Co. v. Mackey*, 351 U.S. 427, 435 (1956). As alluded to in the above Statement of the Case, here the District Court's June 26, 1996, order fell within the ambit of Rule 54(b) because it failed to dismiss Petitioner's action as to all six (6) of the Respondents herein, as the order did not list Respondent the Japanese Ministry of Justice. Since this order was not certified under Rule 54(b), it was not a final judgment. Appendix pp. 4, 7-9. The Ninth Circuit's summary affirmance of the District Court's denial of Petitioner's Motion for Entry of a Final Judgment is therefore in conflict with this Court's decision in *Sears*, as well as reported decisions from other circuits. *Ruffolo v. Oppenheimer & Co., Inc.*, 949 F.2d 33, 35, 36 (2nd Cir. 1991); *Robinson v. Parke-Davis and Company*, 685 F.2d 912, 913 (4th Cir. 1982); *Shirey v. Bensalem Township*, 663 F.2d 472, 475 (3d Cir. 1981); *Thompson v. Betts*, 754 F.2d 1243 (5th Cir. 1985); *Jones v. Estelle*, 693 F.2d 547 (5th Cir. 1982); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1374 (5th Cir. 1980) [holding that Rule 54(b) applies to

orders of dismissal even if "based on jurisdictional or immunity grounds . . . " under the Foreign Sovereign Immunities Act].

Rule 54(b)'s certification requirements are straightforward. They are twofold: (1) The District Court must make an express determination that there is no reason to delay entering final judgment, and (2) it must expressly direct entry of final judgment. Appendix p. 7. Here, the District Court's June 26, 1996, Order Dismissing Petitioner's Action as to Certain Named Defendants failed to meet either of these requirements. It failed to meet the first certification requirement because it contained no express determination that there was no reason to delay entering a final judgment as to the five (5) Respondents as to whom Petitioner's action was actually dismissed, i.e., all of the Respondents other than the Japanese Ministry of Justice. The second certification requirement was also not met because the order did not expressly direct entry of a final judgment under Rule 54(b). The District Court instead purported to enter judgment under Rule 54(a). Appendix p. 4.

Both defects in the District Court's June 22, 1996, order were fatal. As the Second Circuit has noted, strict compliance with Rule 54(b) is "a matter of the greatest importance." *International Controls Corp. v. Vesco*, 535 F.2d 742, 747 (2nd Cir. 1976). This is because the certification requirements of Rule 54(b) are designed to provide litigants in federal court with certainty with respect to the time for filing a notice of appeal. As this Court has observed in *Sears*, 351 U.S. at 435:

> A party adversely affected by a final decision thus knows that his time for appeal will not run against him until this [Rule 54(b)] certification has been made.

It necessarily follows from the above that Petitioner's attempted appeal to the Ninth Circuit on August 20, 1996, from the District Court's June 26, 1996, order of dismissal was actually premature rather than too late as stated in the Ninth Circuit's October 23, 1996, order. Appendix p. 5. Indeed, Petitioner's time for filing a notice of appeal has not still not yet commenced to run. The time will not commence until the district court either complies with the certification requirements of Rule 54(b), or dismisses the action as to all named defendants. *Sears*, 351 U.S. at 435-436; *Wagner v. Farmers & Merchants State Bank*, 787 F.2d 444, 445 (8th Cir. 1986).

While it is true that there is some decisional authority in the Ninth Circuit and the other circuits for the proposition that the mandatory certification requirements of Rule 54(b) can be waived, these cases are strictly limited to situations where such waiver would not result in the loss of valuable appellate rights. In *Riggle v. California*, 577 F.2d 579, 581 n.* (9th Cir. 1978), for instance, the Ninth Circuit waived the Rule 54(b) certification requirements in a situation where both parties were already before the Court and had already briefed the appeal without mention of Rule 54(b). Under these circumstances, waiver of the certification requirements did not deprive either party of the right to litigate the appeal, and only served the interests of conserving judicial resources. The Ninth Circuit was careful to point out in *Riggle*, however, that

waiver of Rule 54(b)'s certification requirements is normally not warranted:

> Under normal circumstances, we would dismiss this appeal because the order dismissing the State of California does not contain the determination of finality required by Fed.R.Civ.P. 54(b)

Id.

In the present case, waiver of Rule. 54(b)'s certification requirements is not warranted because such waiver would only operate to deprive Petitioner of his right to litigate the merits of his appeal. Moreover, Petitioner respectfully submits that such waiver would conflict with the policy enunciated by this Court in *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1983), a case involving Fed. R. Civ. P. 58, that the Federal Rules of Civil Procedure "should be interpreted to prevent loss of the right to appeal, not to facilitate loss."

3. The Ninth Circuit, in summarily affirming the District Court and effectively foreclosing any chance of rehearing or *en banc* review of said affirmance, has both departed from the usual course of judicial proceedings and has sanctioned such departure by the District Court to such an extent as to call for an exercise of this Court's supervisory power.

The District Court departed substantially from the usual course of judicial proceedings by blatantly ignoring both the Federal Rules of Civil Procedure and the legal status of Respondent the Japanese Ministry of Justice as a separate juridical entity, as discussed above. By summarily affirming the District Court in its April 24, 1997,

order, the Ninth Circuit sanctioned this substantial departure. This summary affirmance by the Ninth Circuit in and of itself calls for an exercise of this Court's supervisory power.

To make matters worse, the Ninth Circuit itself made substantial additional departures from the usual course of judicial proceedings. For one thing, it failed to consider Petitioner's opening brief, in contravention of its own case law, in deciding whether to summarily affirm the District Court's November 22, 1996, order. See the Ninth Circuit's April 24, 1996, order in the Appendix at p. 1. The order indicates that the Ninth Circuit did not take into consideration Petitioner's opening brief, which had already been filed on April 18, 1997, in arriving at its decision to summarily affirm the District Court. This point was raised in Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc*. An excerpt from the Petition for Rehearing containing this Argument is contained in the Appendix at pp. 19-20. In addition, the Ninth Circuit also construed Petitioner's Petition for Rehearing as a motion for reconsideration under Ninth Circuit Rule 27-10 in an apparent attempt to bypass the procedures set forth in Fed. R. App. P. 35, which call for distribution of copies of the Petition for Rehearing to all regular active circuit judges so they can vote on the appropriateness of *en banc* review. Appendix at pp. 10-12.

While the above substantial procedural departures may be attributable in part to the same work overloads and long backlogs facing the Ninth Circuit which are also responsible for the current proposal to split the Ninth Circuit into two separate circuits, Petitioner urges upon this Court that this is not a sufficient reason to deprive

him of his valuable appellate rights. (Indeed, undersigned counsel has had other cases summarily disposed of by the Ninth Circuit for this very reason). All Petitioner, a non-English speaking pro per litigant, asks is that this Court exercise its supervisory powers in a way which will grant him the opportunity to which he is entitled to file a notice of appeal and have the merits of his appeal passed upon by the Ninth Circuit.

CONCLUSION

The Petitioner requests review before this Court in order to resolve the conflict between the Ninth Circuit's April 24, 1997, decision and cases from this Court and other circuits (1) recognizing that the inclusion or omission of a particular foreign agency or instrumentality from a judgment or order is a matter of tremendous legal significance, and (2) requiring strict compliance with the judgment certification requirements of Fed. R. Civ. P. 54(b), in order to preserve certainty with respect to the finality of judgments, in cases where the District Court's order disposes of fewer than all claims as to all parties. These issues are of tremendous legal significance and have far-reaching implications for litigants in federal court nation wide.

Petitioner further requests review of the substantial departures from the usual course of judicial proceedings both sanctioned and committed by the Ninth Circuit, as outlined above.

The Petition for certiorari should be granted.

Respectfully submitted,

EDWARD O.C. ORD
ORD & NORMAN
120 Montgomery Street, Suite 1055
San Francisco, CA 94101
(415) 274-3800

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MASAMI AIZAWA, Plaintiff/Appellant, vs. THE SOVEREIGN STATE OF JAPAN, et al., Defendants/Appellees.	) No. 97-55093)) DC# CV-94-2401-HLH) Central California)) ORDER)) (Filed Apr. 24, 1997)

Before: BROWNING, THOMPSON and HAWKINS, Circuit Judges

A review of the record and appellant's response to this court's order to show cause indicates that the questions raised in this appeal are so insubstantial as not to need further argument. *See United States v. Hooton*, 693 F.2d 857 (9th Cir. 1982) (per curiam). Accordingly, we summarily affirm the district court's decision. All pending motions are denied as moot.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 94-2401 HLH Date Nov. 22, 1996

Title Aizawa v. The Sovereign State of Japan.

DOCKET ENTRY

PRESENT:

HON. HARRY L. HUPP, Judge

Milli Borgarding
Deputy Clerk

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: **ATTORNEYS PRESENT FOR DEFENDANTS**

PROCEEDINGS: Order denying motion filed 11/8/96.

ORDER (also, if applicable, findings and memorandum opinion):

The motion of plaintiff filed 11/8/96 requesting entry of final judgment is denied as moot. Final judgment in this matter was entered on June 26, 1996, dismissing the action as to all defendants then left in the case.

Plaintiff states that the court neglected to specifically name the Ministry Of Justice of Japan in the order dismissing this action, and that therefore the action is still alive. However, the Ministry of Justice is merely a part of

"The Sovereign State of Japan" and was dismissed along with all of the other agencies of the Japanese government. This was made clear in the minute order of June 24, 1996, which made it clear that the action was dismissed as to Japan, and all of its agencies, by reason of sovereign immunity.

Since the motion filed Nov. 8, 1996, is based on an incorrect premise (that the action has not long since been disposed of in this court), the motion is denied. The matter is removed from the court's calendar of Dec. 16, 1996.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MASAMI AIZAWA, Plaintiff, v. THE SOVEREIGN STATE OF JAPAN, et al., Defendants.	No. CV94-2401-HLH (RCx) ORDER DISMISSING ACTION AS TO CERTAIN DEFENDANTS (Filed Jun. 24, 1996) (Entered Jun. 26, 1996)

This action is dismissed with prejudice as to defendants The Sovereign State of Japan, The Japanese Ministry of Foreign Affairs, The Supreme Prosecutor's Office of Japan, the Ishinomaki District Public Prosecutor's Office. The Sendai High Public Prosecutor's Office, and Does 1 through 100 inclusive.

This Order is a final judgment for purposes of Fed.R.Civ.P. 54(a). It shall be entered pursuant to Fed.R.Civ.P. 58 and 79(a), and served upon the parties.

IT IS SO ORDERED.

Date: June 24, 1996.

/s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MASAMI AIZAWA, Plaintiff-Appellant, vs. THE SOVEREIGN STATE OF JAPAN, et al., Defendants-Appellees.	)	No. 96-56327 DC# CV-94-02401-HLH Central California (Los Angeles) ORDER (Filed Oct. 23, 1996)

Before: BEEZER, KOZINSKI and KLEINFELD, Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *Sees Fed. R. App. P. 4(a)(1). Alexander v. Sacha*, 439 F.2d 742 (9th Cir. 1971) (requirement of the timely notice of appeal is jurisdiction). All pending motions are denied.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MASAMI AIZAWA, Plaintiff/Appellant, vs. THE SOVEREIGN STATE OF JAPAN, et al., Defendants/Appellees.	) No. 97-55093)) DC# CV-94-2401-HLH) Central California)) ORDER)) (Filed Jun. 4, 1997)

Before: BROWNING, THOMPSON and HAWKINS, Circuit Judges

Appellant's petition for rehearing is construed as a motion for reconsideration of this court's April 24, 1997 order. So construed, the motion for reconsideration is denied. *See* 9th Cir. R. 27-10. The suggestion for rehearing en banc is rejected. *See* General Order § 6.11.

VII. JUDGMENT

Rule 54. Judgments; Costs

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the

party has not demanded such relief in the party's pleadings.

(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related non-taxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without record to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judgment under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

CIRCUIT RULE 27-10
MOTIONS FOR RECONSIDERATION

Unless the time is shortened or enlarged by order of this court, a motion for clarification, reconsideration, or rehearing of an order entered by a motions panel must be filed within 14 days of the date of the order, except a prisoner not represented by an attorney shall have 28 days.

A motion for clarification, reconsideration or rehearing of an order issued by an appellate commissioner shall be decided by a motions panel unless the appellate commissioner grants reconsideration of the order. Such a motion must be filed within 14 days from entry of the appellate commissioner's order, except that a prisoner not represented by an attorney shall have 28 days.

A party seeking relief under this rule shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity.

No answer to a motion will be filed unless requested by the court, but ordinarily the court will not grant a motion without such a request.

A party may file only one motion for clarification, reconsideration or rehearing of an order entered by a motions panel. The motion's format shall be governed by Circuit Rule 32(a)-(e). Except by permission of the Court, a motion for clarification, reconsideration or rehearing shall not exceed 10 monotype, double-spaced pages or

2,800 words and shall be accompanied by a certificate of compliance as described at Rule 32(e)(4).(rev. 1/97)

* * *

FRAP 35
DETERMINATION OF CAUSES BY THE COURT EN BANC

(a) When hearing or rehearing en banc will be ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a party for hearing or rehearing en banc. A party may suggest the appropriateness of a hearing or rehearing en banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard en banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) Time for suggestion of a party for hearing or rehearing en banc; suggestion does not stay mandate. If a party desires to suggest that an appeal be heard initially en banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing en banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

(d) Number of Copies – The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Dec. 1, 1994.)

* * *

§ 1610. Exceptions to the Immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not

immune by virtue of section 1605(a) (2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(Added Pub.L. 94-583 § 4(a), Oct. 21, 1976, 90 Stat. 2896, and amended Pub.L. 100-640, § 2, Nov. 9, 1988, 102 Stat. 3333; Pub.L. 100-669 § 3, Nov. 16, 1988, 102 Stat. 3969; Pub.L. 101-650, Title III, § 325(b)(9), Dec. 1, 1990, 104 Stat. 5121; Pub.L. 104-132, Title II, § 221(b), Apr. 24, 1996, 110 Stat. 1243.)

EDWARD O.C. ORD
ORD & NORMAN
120 Montgomery Street, Suite 1055
San Francisco, CA 94104
Telephone: (415) 274-3800

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MASAMI AIZAWA, Plaintiff/Appellant vs. THE SOVEREIGN STATE OF JAPAN, et al., Defendants/Appellee.	Case No. CV 94-2401 HLH (RCX)

1. I am Masami Aizawa, the plaintiff [sic] the above-captioned case. I am a Japanese national born and raised in Japan and have lived the majority of my life in Japan.

2. My legal representation with my counsel Mr. Ord terminated at the time this Court issued its Order Dismissing Action as to certain defendants. This was on June 26, 1996. Thereafter, I was representing myself.

3. I filed the Notice of Appeal myself.

4. I was confused about the above order, which dismissed the action as to only certain defendants and not the Japanese Ministry of Justice.

5. I am not familiar with the legal procedures and my English is not good at all, especially dealing with any legal vocabulary, the rules or the procedures of this Court or the higher Court. I find the entire situation very confusing.

6. I asked the Court's help to finalize the matter and give me my opportunity to have my case reviewed by the higher court.

7. I declare that this declaration has been read to me in excellent, clear Japanese by a person Fluent in English, and I fully understand the English text.

This declaration is made on the basis of personal knowledge and is believed to be true and correct, and is made under declaration of penalty of perjury.

Executed this 1st day of November, 1996, at San Gabriel, California.

/s/ Masami Aizawa
MASAMI AIZAWA

* * *

ARGUMENT

I. THIS COURT MUST GRANT THE PETITION FOR REHEARING BECAUSE THE COURT OSTENSIBLY DID NOT LOOK AT OR CONSIDER APPELLANT AIZAWA'S OPENING BRIEF, WHICH HAD ALREADY BEEN FILED, IN ARRIVING AT ITS DECISION TO SUMMARILY AFFIRM THE DISTRICT COURT AND DISMISS THE APPEAL. THE FAILURE TO CONSIDER APPELLANT AIZAWA'S OPENING BRIEF IS IN CONFLICT WITH THIS COURT'S DECISIONS IN PAGE AND HOOTON, WHICH REQUIRE SUMMARY AFFIRMATION TO BE BASED UPON AN EXAMINATION OF THE OPENING BRIEF.

As indicated above, this Court's April 24, 1997, order summarily affirming the DC appears to show that this Court did not look at or consider Appellant's opening brief in arriving at its decision. The brief, however, was available to this Court for consideration as it had been filed on April 18, 1997. Under *Hooton*, 693 F.2d 857, 858 (9th Cir. 1982), and *Page*, 356 F.2d 337, 339 n.1 (9th Cir. 1966), this Court was required to examine Appellant's opening brief and make a determination that the outcome of the current appeal was beyond dispute before summarily affirming the DC. Because it failed to do so and because the issues herein are clearly not beyond dispute, the petition must be granted.

In *Page*, this Court held:

> Motions to affirm should be made only after the appellant's brief is on file and only where, as here, the insubstantiality of the questions raised

> on appeal is clearly ascertainable from an examination of the record and the opening brief.

356 F.2d at 339 n.1.

In *Hooton*, the case cited by this Court in its April 24, 1997, order, a convicted criminal defendant appealed the district court's denial of his Rule 35 (Federal Rules of Criminal Procedure) motion for reduction of sentence, and filed a one page opening brief in this Court. 693 F.2d at 858. Not surprisingly, this Court summarily affirmed the district court because the insubstantiality of the appeal appeared from the face of Appellant's brief. *Id.* at 859. This Court also pointed out that the appeal was entirely without merit because the "Rule 35 motion [was] essentially a plea for leniency and [was] addressed to the sound discretion of the district court." *Id.*

Here, in contrast, any fair reading of Appellant's opening brief, which is 23 pages in length, reveals that the issues herein are far from insubstantial. As will be discussed further below, the opening brief raises several issues of exceptional importance which were were [sic] apparently overlooked by this Court. Moreover, unlike Federal Criminal Rule 35 at issue in *Hooton*, the madatory certification requirements of F.R.C.P. 54(b) at issue herein *are not within the sound discretion* of the district court. Neither is the reality that the Japanese Ministry of Justice is a separate juridical entity which the District Court was required *to list separately* in its June 26, 1996, order of dismissal if the order was to have the effect of dismissing Aizawa's action as to that particular entity.

* * *